Supreme Court, U.S.
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No. 98-1600

In The

Supreme Court of the United States

ROBERT W. "BOBBY" UNSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO OPPOSITION

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QUESTIONS PRESENTED

1. Whether a person can be convicted of a crime without proof of *mens rea*:

   A. In the absence of a clear indication on the part of Congress to dispense with the *mens rea* requirement; and

   B. When the crime does not satisfy the requirements for a "public welfare offense" as established by *Morissette v. United States*, 342 U.S. 246 (1952), and its progeny?

2. Whether a court may shift the burden of proof of an affirmative defense to the defendant in the absence of an Act of Congress authorizing that shift without violating the Due Process Clause of the Fifth Amendment?

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INTRODUCTION

The United States Court of Appeals for the Tenth Circuit, *United States v. Unser*, 165 F.3d 755, 757 (10th Cir. 1999), best characterized the nature of this case:

> This case arises from a story of survival in the wilderness under extreme conditions and involves legal issues requiring examination of some of the most fundament concepts in criminal law. Like the parties obviously do, we view the case as having significance beyond the penalty actually imposed.

Regrettably, the opinion that follows this trenchant statement conflicts with this Court's holdings as to *mens rea*. Worse yet, as Respondent's brief reveals, Respondent asks this Court to look the other way as federal officials read *mens rea* out of almost every federal statute, particularly federal statutes that relate to "protecting the environment."

What is at stake here is nothing less than "first principles":

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequence ability and duty of the normal individual to choose between good and evil.

Morissette v. United States, 342 U.S. 246, 250 (1952).

In light of the threat to these first principles posed by the Tenth Circuit's ruling and by Respondent's view as to when *mens rea* is required, Mr. Unser's petition should be granted.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *MORISSETTE v. UNITED STATES*.

Respondent asserts that Mr. Unser was convicted properly of a "public welfare offense." Brief in Opp. at 6-9. However, Respondent misstates the crimes for which *mens*

rea is required and misconstrues this case to bring it into compliance with *Morissette*. Respondent's disingenuous argument must be rejected.

A. *Mens Rea* Is Not Reserved For "Infamous Crimes."

Respondent asserts that, unlike "infamous crimes," "public welfare offenses" do not require proof of *mens rea*. To the contrary, as this Court held in *United States v. Balint*, 258 U.S. 250, 251 (1922), "[T]he general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime . . . " Furthermore, this Court has held that strict liability is the exception, not the rule, and *mens rea* will not be read out of a statute without the express intent of Congress. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978);[1] *Staples v. United States*, 511 U.S. 600, 620 (1994).[2] Respondent's argument that *mens rea* is only for "infamous crimes" finds no support in this Court's opinions and must be rejected.

B. This Is Not A Public Welfare Offense.

Respondent cites *Morissette* as to "public welfare offenses" and attempts, unsuccessfully, to force the square peg of this case into the round hole of that offense. Brief in Opp. at 6-8.

- Respondent asserts that, unlike common law crimes, public welfare offenses do not involve "invasions;" however, the offense here is the invasion of a wilderness area.
- Respondent asserts that public welfare offenses create a "danger or probability of [danger]" of

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[1] "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Id.*, *quoting Dennis v. United States*, 341 U.S. 494, 500 (1951).

[2] "[I]f Congress had intended to [eliminate *mens rea*], it would have spoken more clearly to that effect." *Id.*

"direct or immediate injury to person or property;" however, the offense here creates no such danger to "person or property."

- Respondent asserts that public welfare offenses require only "reasonable" "care" and "exertion;" however, the offense here imposes demands that are unreasonable in a blinding blizzard with zero visibility!
- Respondent asserts that public welfare offenses impose "relatively small" penalties that do "no grave damage" to one's reputation; however, the offense here carried penalties of six months in jail and public disgrace as an "environmental criminal."

Respondent's attempt to characterize the offense here as a "traffic violation" fails because the federal statutes at issue control the "occupancy and use," by motor vehicles, of federal land designated as wilderness to ensure their "solitude." Thus, these statutes are not traffic laws in any true sense of those words, for which proof of *mens rea* is not required, but trespass laws, for which the common law required proof of *mens rea*. Moreover, Respondent's analysis of the offense here as a "traffic violation" is alternately arrogant and absurd.

Respondent asserts that a wilderness boundary in snow-covered Colorado high country is comparable to the double yellow line down the middle of an asphalt highway that one may avoid crossing with a modicum of effort. Respondent's assertion is absurd:

- The wilderness area at issue here, like most wilderness areas, has no on-the-ground markers in the summer, let alone in the winter, when any signs are buried in snow.
- Although the boundary of the wilderness area at issue here is marked on federal maps, ascertaining one's position, as well as the boundary on the ground, requires identification of features that are buried or obscured by deep snow.

- At the time of Mr. Unser's near-death experience, high winds and blowing and drifting snow reduced visibility to zero, making any attempt to use a map impossible.

Respondent asserts that the penalty faced by Mr. Unser is "relatively small" compared to "heavier sentences" that are "common." Respondent's assertion is arrogant:

- The question is not whether the penalty was "relatively small," compared with rape, arson, and murder, but was the penalty "severe." *Staples*, 511 U.S. at 618.
- Respondent's assertion that six months in a federal prison is "modest" is brazen and contrary to this Court's holdings. *Id.* at 635. Public welfare offenses provide "for only light penalties . . . not imprisonment in the state penitentiary." *Id.* at 616.
- Mr. Unser was charged in the Information with the felony of aiding and abetting his friend in violating the Wilderness Act. This Court has suggested that a felony may never be a public welfare offense. *Staples*, 511 U.S. at 618.

Respondent asserts that Mr. Unser's conviction does not "gravely besmirch [his] reputation." Respondent's assertion is absurd:

- The question is not whether conviction of rape, arson, or murder would besmirch Mr. Unser's reputation more seriously, but whether conviction of an environmental crime besmirches his reputation. Mr. Unser's reputation has been besmirched.
- Respondent's assertion that Mr. Unser's reputation has suffered only as a result of his "refusal to accept responsibility for his conduct" (being lost in a blizzard?), but not as a result of his conviction, is droll. Mr. Unser's reputation has suffered.

- Conviction as a "welfare cheat" may be less damaging to one's reputation than conviction for rape, arson, or murder, but it did not prevent this Court from requiring *mens rea* in *Liparota v. United States*, 471 U.S. 419 (1985).

Respondent's attempt to characterize the offense here as a traffic violation and otherwise consistent with this Court's holdings in *Morissette* and its progeny must be rejected.

C. The Tenth Circuit's "Other Factors" Conflict With This Court's Holdings.

Respondent asserts that because "[t]here is no mention of intent in the statute or regulations" the offense here is a "public welfare offense." Brief in Opp. at 9. Yet silence is not enough to read *mens rea* out of a statute. "[S]ome indication of congressional intent, express or implied, is required to dispense with *mens rea* . . . " *Staples*, 511 U.S. at 606, *citing Liparota*, 471 U.S. at 426; *United States Gypsum Co.*, 438 U.S. at 438; *Morissette*, 342 U.S. at 263.

Respondent asserts that because the offense here "does not employ *the terms of*, or otherwise derive *directly from*, any common law crime that itself requires intent," *mens rea* is not an element. Brief in Opp. at 9 (emph. added). Yet this Court has never required that a statute "employ the terms of" or "derive directly from" a common law crime to be subject to "the general rule at common law . . . that the scienter [is] a necessary element in . . . every crime . . . " *Morissette*, 342 U.S. at 258. Rather, this Court distinguishes between an act of Congress "merely adopting into federal statutory law *a concept of crime* already so well defined in common law and statutory interpretation by the states" and one "creating *an offense new to general law*, for whose definition the courts have no guidance except the Act." *Id.* at 262 (emph. added).

Because the "concept of crime" here is trespass and "well defined in common law," *mens rea* is required.[3]

Respondent asserts that because Congress sought to "protect wilderness areas from the *irreparable damage* that can be caused by motor vehicles," the offense here is a "public welfare offense." Brief in Opp. at 9 (emph. added). Yet Congress sought not to prevent "irreparable damage," but to ensure that wildernesses would remain areas "where the earth and its community of life are untrammeled by man" so as to "retain [their] primeval character and influence [with] outstanding opportunities for solitude. . . . " Wilderness Act of 1964, 16 U.S.C. § 1131(c). While a snowmobile may disturb the "solitude," it will not "damage" the wilderness area, buried beneath feet of snow, nor will the disturbance be "irreparable." Even if Respondent's view of the goal of Congress were true, it would not provide the intent to eliminate *mens rea* from that offense.

Respondent's attempt to justify the Tenth Circuit's "other factors" must be rejected.

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *LIPAROTA v. UNITED STATES*.

Respondent asserts that the Tenth Circuit's holding is not in conflict with this Court's holding in *Liparota v. United States*, 471 U.S. 419 (1985). However, Respondent sets forth, not this Court's holding as to why the statute at issue was not a "public welfare offense," but its own rationale. Brief in Opp. at 9-10. Respondent's rewrite of *Liparota* must be ignored.

In *Liparota*, this Court rejected the Government's argument that the offense was a "public welfare offense" because that offense "differs substantially from those 'public welfare offenses' we have previously recognized." *Id.* at 432-433. As

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[3] "[In] *[t]respass quare clausum fregitis* . . . the defendant was called upon to show why he broke . . . the real or imaginary structure inclosing the land. . . . " *Black's Law Dictionary*, 1951.

to the nature of that difference, this Court explained, "Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulations and may seriously threaten the community's health or safety."[4] *Id.* at 433. Thereupon, the Court set forth its holding in a case involving unregistered hand grenades: "[O]ne would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.*, *quoting United States v. Freed*, 406 U.S. 601, 609 (1971). In conclusion, this Court declared, "A food stamp can hardly be compared to a hand grenade . . . nor can the unauthorized acquisition or possession of food stamps be compared to the selling of adulterated drugs . . . " *Liparota*, at 433.

This Court's holding in *Liparota* may be paraphrased: "A [snowmobile] can hardly be compared to a hand grenade . . . , nor can the unauthorized [possession and use of a snowmobile] be compared to the selling of adulterated drugs . . . " Clearly the Tenth Circuit's holding is in conflict with this Court's holding in *Liparota*.

III. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *STAPLES v. UNITED STATES*.

Respondent asserts that the Tenth Circuit's holding is not in conflict with this Court's holding in *Staples*, 511 U.S. 600 (1994), by setting forth, not this Court's holding, but Respondent's own rationale. Brief in Opp. at 11. Thus, Respondent asserts that *Staples* turned on the penalty because that was done "[h]istorically." *Id.* at 616. But this Court rejected "such a definitive rule of construction" and relied instead on "a common-sense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectation that individuals may legitimately have in dealing with the regulated items." *Id.* at 619.

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[4] The Tenth Circuit acknowledged that Mr. Unser's alleged crime posed no threat to public health and safety. *United States v. Unser*, 165 F.3d 755, 762-63 (10th Cir. 1999).

Contrary to Respondent's assertion, this Court did not "delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not." *Id.* at 619, *quoting Morissette*, 342 U.S. at 260. In fact, this Court's recognition that there is no "comprehensive criteria" for determining when *mens rea* applies gives lie to Respondent's assertion that the offense here "falls within a well-recognized category of public welfare offenses that dispenses with a *mens rea* requirement." Brief in Opp. at 11. There is no "well-recognized category."[5]

Finally, Respondent's erroneous assertion that the offense here involves a "traffic violation," and not a trespass, high centers on this Court's refusal to accept "as a general rule the Government's suggestion that [crimes involving] dangerous and regulated items" are exempt from the *mens rea* requirement. *Staples*, 511 U.S. at 614. "[W]e probably would hesitate to conclude on the basis of silence that Congress intended a prison term to apply to a car owner whose vehicle's emissions levels, wholly unbeknownst to him, began to exceed legal limits between regular inspection dates." *Id.* Why therefore, should strict liability apply to the owner whose motor vehicle, "wholly unbeknownst to him," in the midst of a blinding blizzard, drifts into an unmarked wilderness area? To paraphrase this Court's holding in *Staples*, 511 U.S. at 620:

> [A holding that *mens rea* is required regarding Mr. Unser] depends critically on our view that if Congress had intended to make outlaws of [snowmobilers] who were wholly ignorant of [their entry into a wilderness area in the midst of a blizzard],

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[5] One reason why there is no such "well-recognized category": "Assume that a motorist has crossed the center line of the highway at a place where this is prohibited. The fact that he did so unintentionally and without negligence may be no defense to a charge of traffic violation; but it will be a complete defense to a charge of manslaughter if a fatal traffic accident should result. That would be innocent homicide – homicide without the normal *mens rea*." R. Perkins, *Criminal Law*, 794-795 (2d ed. 1969).

> and to subject them to [severe penalties], it would have spoken more clearly to that effect.

The Tenth Circuit's decision is in conflict with this holding.

IV. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS BY OTHER FEDERAL COURTS OF APPEALS.

Respondent asserts that the holding of the Tenth Circuit is not in conflict with the holdings of the Ninth Circuit because the phrases "[p]lacing or allowing" (*United States v. Semenza*, 835 F.2d 223 (9th Cir. 1987)) and "permits or suffers" (*United States v. Launder*, 743 F.2d 686 (9th Cir. 1984)) require a willful act, whereas the phrase "[p]ossessing or using" (*Unser*) does not. Respondent's distinction is not only deficient, it is disingenuous and must be rejected.

Respondent repeats its well-worn and erroneous assertion that there exists a "recognized category of offenses (motor vehicle offenses) that require no *mens rea*" as the primary basis for distinguishing *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), from the Tenth Circuit's decision. Respondent's assertion has no basis and must be rejected.

Respondent does not attempt to address the Tenth Circuit's failure to apply the test for a public welfare offense from *Holdridge v. United States*, 282 F.2d 302 (8th Cir. 1960).

V. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS BY THIS COURT AND THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Respondent asserts that because the offense at issue here is a "public welfare offense" the court may infer that "Congress would not have wanted to place the burden of proof with respect to that defense on the government." Brief in Opp. at 15. This is an impermissible inference on an inference. Respondent infers that the offense here is a "public welfare offense," then infers that Congress would not have wanted the burden of proof placed on the government.

Normally, because the necessity defense would have negated the *mens rea* element, Respondent would have had to bear the burden of proving that Mr. Unser could not claim the defense of necessity. However, because the district court held that no proof of *mens rea* was required, the burden was shifted improperly to Mr. Unser. Thus, the district court's erroneous *mens rea* ruling doomed Mr. Unser's defense.

To these conflicts and constitutional violations,[6] Respondent responds merely that the offense at issue is a public welfare offense. That response is clearly inadequate.

CONCLUSION

Respondent has failed to provide any cogent reason for rejecting Mr. Unser's request that this Court review and reverse the erroneous decision of the United States Court of Appeals for the Tenth Circuit. Therefore, Mr. Unser's Petition for *Writ* of *Certiorari* should be granted.

Respectfully submitted,

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[6] The conflicts are with the Fifth Amendment to the Constitution; *Patterson v. New York*, 432 U.S. 197 (1977); and *United States v. Talbott*, 78 F.3d 1183 (7th Cir. 1996).